

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

RENE CABRERA, et al.,  
Plaintiffs,  
v.  
GOOGLE LLC,  
Defendant.

Case No. [5:11-cv-01263-EJD](#)

**ORDER GRANTING PLAINTIFFS'  
MOTION TO STRIKE EXPERT  
REPORT OF RONALD WILCOX**

Re: Dkt. No. 577

Plaintiffs Rene Cabrera (“Cabrera”) and RM Cabrera Company (“RMC”) (collectively referred to as “Plaintiffs”) initiated this putative class action suit against Defendant Google LLC (“Google”), asserting claims for breach of contract and violation of California Business and Professions Code § 17200 *et seq.* Plaintiffs move to strike the Expert Report of Professor Ronald Wilcox (“Wilcox”) dated November 19, 2021 (“Wilcox Report”). ECF 576-4.<sup>1</sup> Google LLC (“Google”) filed an opposition (ECF 627), and Plaintiffs filed a reply (ECF 612-4).<sup>2</sup> For the reasons discussed below, Plaintiffs’ motion is GRANTED.

<sup>1</sup> Plaintiffs’ proposed redactions in their administrative motion to seal, ECF 576, are excessive. Google’s Statement in Support of Administrative Motions to File Under Seal, ECF 590, does not specify what portions of Plaintiffs’ motion to strike the Wilcox Report (ECF 576-4) it seeks to file under seal. Therefore, the parties are directed to meet and confer and submit a proposed public version of ECF 576-4 with substantially fewer redactions no later than five business days after issuance of this Order.

<sup>2</sup> The Court denied Plaintiffs’ administrative motion to seal the reply. *See* ECF 641. Plaintiffs shall file an unredacted version of their reply no later than five business days after issuance of this Order.

**I. BACKGROUND<sup>3</sup>**

The basic functionality of Google’s AdWords program at issue is described in a previous order of the Court as follows:

Google’s AdWords program lets advertisers create and display ads on webpages within Google’s ad network. Advertisers must agree to the terms of the AdWords Agreement. Typically, the cost of advertising in the AdWords network is set on a cost-per-click basis, which is determined by a combination of several factors, including an auction system in which advertisers bid on the amount they are willing to pay per click.

As part of its system for determining click prices, Google employs a “Smart Pricing” scheme that provides a cost-per-click discount to advertisers based on a “conversion score” of the webpage where the ad appears. Under the Smart Pricing system, the advertiser’s cost will be reduced if Google determines that an ad impression on a webpage “is less likely to produce a conversion”—e.g., a purchase on the advertiser’s website—than it would on [a] benchmark property.”

Google also provides a “Location Targeting” tool that “allows advertisers to serve ads that are relevant to particular geographic areas.” Google uses several factors to decide when to display a location-targeted ad, including a visitor’s estimated physical location, geographic terms in search queries, the country code in a website’s domain name, and language settings in the visitor’s browser.

Order Granting In Part And Denying In Part Def.’s Mot. For Summary Judgment, ECF 253 (citations omitted).

**A. Breach of Contract: Smart Pricing**

Cabrera signed up for AdWords on August 14, 2008, on behalf of Training Options, Inc. (n/k/a RMC) by clicking through the Google Inc. Advertising Program Terms (the “Agreement”). FAC. ¶ 7. The Agreement provides that: “Charges are solely based on Google’s measurements for the applicable Program, unless otherwise agreed to in writing” (hereinafter “Measurements Clause”). FAC, Ex. A. The fully integrated Google AdWords Agreement does not mention the terms “Smart Price” or “Smart Pricing.” Despite the absence of these terms in the Agreement, Plaintiffs allege that they reasonably interpreted the Measurements Clause to mean that Google would apply Smart Pricing discounts to the clicks on Plaintiffs’ ad on the Display Network.<sup>4</sup>

<sup>3</sup> The Background is a summary of Plaintiffs’ allegations in the Fifth Amended Complaint (“FAC”).

<sup>4</sup> The Court sustained this interpretation at the pleadings stage. *Woods v. Google, Inc.*, Case No.: [5:11-cv-01263-EJD](#)  
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Nearly ten years after Cabrera signed up for AdWords<sup>5</sup>, Plaintiff allege that Google breached the Agreement by not applying the Smart Pricing discounts to clicks on ads displayed on Google's partners' websites on the Display Network between August 22, 2006 and February 20, 2013. FAC ¶ 11. Specifically, Plaintiffs allege Google did not apply the Smart Pricing Measurement as calculated by Google's Smart Pricing formula to at least forty (40) clicks on the Display Network in Cabrera's account between August 14, 2008 and August 12, 2009. *Id.* Likewise, Google allegedly failed to Smart Price clicks from mobile apps between August 22, 2006 and February 20, 2013. All mobile apps are part of the Display Network. Discovery has revealed that Google failed to Smart Price at least nineteen (19) clicks in Cabrera's account that originated from mobile apps between August 14, 2008 and August 12, 2009. ¶ 12.

#### **B. UCL Claim: Location Targeting**

During the AdWords sign-up process, RMC was presented with the following statement on the Settings Screen:

##### **Target customer by regions / cities**

Highlight the cities and regions on the left where you'd like your ad to appear, then click "Add." Select as many regions as you like. You may also type city names directly into the box below.

FAC ¶ 63. In response, Plaintiffs targeted Florida, Georgia, Louisiana, and North Carolina for its ad campaign. *Id.* ¶ 64. Plaintiffs wanted to limit RMC's campaign to these four states because RMC's training school catered to local clients. *Id.* By making this selection, Plaintiffs understood and expected that RMC's ads would be shown only to users in those states. *Id.* ¶¶ 64, 73. Despite Plaintiffs' targeted location settings, Google showed RMC's ad to users outside of its four

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2013 WL 1435224, at \*4 (N.D. Cal. Apr. 9, 2013) ( "the 'measurements clause' could be reasonably interpreted as requiring Google to base its charges for Display Network clicks at least in part on the Smart Pricing formula." )

<sup>5</sup> See Pl.'s Mot. for Leave to File Third Am. Class Action Compl. filed on March 20, 2018, ECF 286.

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1 designated states. *Id.* ¶ 65. Google charged RMC \$88.73 for 34 clicks from outside its targeted  
2 advertising locations. *Id.*

3 Plaintiffs allege that Google’s representations regarding location targeting were fraudulent  
4 in violation of § 17200 because they were likely to deceive advertisers into believing that Google  
5 would limit the distribution of ads to users located in the geographic locations designated by  
6 advertisers. *Id.* ¶ 78. Moreover, Plaintiffs allege that Google failed to disclose that: (a) it would  
7 distribute ads to users beyond the geographic locations designated by advertisers; (b) it would  
8 charge advertisers for clicks on their ads originating outside the designated geographic locations;  
9 and (c) it would falsely report the geographic location of users in its online reports to advertisers.  
10 *Id.* ¶ 78. As a result of Google’s allegedly fraudulent conduct, RMC allegedly expended money  
11 on advertising with Google that it otherwise would not have spent. *Id.* ¶ 80. Plaintiffs allege that  
12 Google’s conduct is unfair, unlawful, and fraudulent. *Id.* ¶ 83.

### 13 **C. Wilcox Report**

14 Wilcox designed and implemented a survey, the “Purchase Reasons and Information  
15 Sources Survey,” that explored the features and benefits of Google Ads that motivate the purchase  
16 and use of that product, the information sources used by advertisers, and whether the Smart  
17 Pricing and location targeting features are important to Google Ads advertisers. Wilcox Report ¶  
18 18. According to Wilcox, “there exists considerable heterogeneity among Google Ads  
19 advertisers,” and “survey results confirm that Google Ads advertisers vary significantly with  
20 respect to a wide array of characteristics, including campaign goals, advertising budget, firm size,  
21 motivating factors, and information resources used, among others.” *Id.* ¶ 22. Wilcox concluded  
22 that this heterogeneity exists within a group of 57 respondents who began using Google Ads 8 or  
23 more years ago. *Id.* ¶ 23. Based on this timeframe, the group of 57 respondents are potentially  
24 members of the putative class.

25 Wilcox opines that core marketing principles and objectives of marketers and advertisers  
26 have remained consistent for decades, and therefore, he “has no reason to think . . . that the

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heterogeneity of responses [in the survey] would be different between the putative class periods and today.” *Id.* ¶ 23. Wilcox also opines that:

- a. Respondents indicated varying preferences for which Google Ads features were important, and varied substantially in the value that they received from a given important feature.
- b. Results demonstrate a high degree of variation regarding respondents’ familiarity with and use of Smart Pricing, with many failing to correctly identify its key benefits and deriving a wide range of value.
- c. Most respondents selected Google Ads options that override the application of Smart Pricing.
- d. Most Google Ads advertisers prefer hybrid strategies that include Area of Interest targeting, while few advertisers use only Location of Presence based targeting.
- e. Advertisers highly value many Google Ads features and are highly satisfied with those features, with very few (if any) instances of advertiser dissatisfaction.

*Id.* ¶ 24. Wilcox also reviewed the March 20, 2018 Kivetz Report, which was prepared by another Google expert, and concluded that the Wilcox survey results are consistent with the findings and conclusions in the Kivetz Report. *Id.* ¶ 25.

## II. DISCUSSION

Plaintiffs move to strike the Wilcox Report for three reasons: (1) the Report is untimely; (2) Wilcox’s opinions are irrelevant; and (3) Wilcox’s opinions are unreliable. Dkt. No. 577. In response, Google asserts that the Report complies with the Scheduling Order (ECF 571) deadline for supplemental expert reports; that Wilcox’s opinions, including his survey of Google Ads advertisers, are relevant to the predominance and typicality inquiries for class certification; that Wilcox conducted his survey in accordance with widely accepted practices in his field; and that any criticisms about Wilcox’s methodology go to the weight, not the admissibility, of his opinions.

A party must disclose expert reports “at the times and in the sequence that the court orders.” Fed. R. Civ. P. 26(a)(2)(D). If a party fails to timely provide an expert report, “the report must be stricken . . . unless the failure was substantially justified or is harmless.” *Abdo v.*

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1 *Fitzsimmons*, 2020 WL 4051299, at \*4 (N.D. Cal. July 20, 2020) (quoting Fed. R. Civ. P.  
2 37(c)(1)). Rule 37 (c)(1) is a “‘self-executing,’ ‘automatic’ sanction to ‘provide[ ] a strong  
3 inducement for disclosure of material’ that must be disclosed pursuant to Rule 26.” *Tamburri v.*  
4 *Suntrust Mortg., Inc.*, 2013 WL 3152921, at \*1 (N.D. Cal. June 19, 2013) (quoting Fed. R. Civ. P.  
5 37 advisory committee’s notes).

6 Here, the parties’ dispute regarding the timeliness of the Wilcox Report is based in part on  
7 their conflicting interpretations of the July 19, 2021 Scheduling Order. After the Ninth Circuit  
8 remanded this case, the parties filed a joint statement on June 30, 2021, to propose a case  
9 schedule. Joint Statement re: Case Schedule, ECF 569. Google asserted, among other things, that  
10 its experts needed a “fair chance to evaluate RMC’s evidence” because RMC was a newly added  
11 party. *Id.* at 5. Google further stated that “expert discovery is necessary to allow (1) the parties’  
12 experts to prepare supplemental reports to incorporate new evidence, and (2) supplemental  
13 depositions.” *Id.* at 6. Google explained: “[t]he parties’ expert reports address only Cabrera, a  
14 natural person who apparently uses idiosyncratic measures to value advertising, and who is no  
15 longer a plaintiff for the Location Targeting/Unfair Competition Law claim. [] Google’s experts  
16 must be able to address this fundamental change to the case and the other evidence that comes to  
17 light in discovery.” *Id.* Based on the parties’ joint statement, the Court issued a Scheduling Order  
18 on July 19, 2021, setting a November 19, 2021 deadline for supplemental expert reports, if any,  
19 and a December 17, 2021 deadline for completing expert discovery. ECF 571. Thereafter,  
20 Google served the Wilcox Report on the November 19, 2021 deadline.

21 Plaintiffs contend that the Wilcox Report is untimely even though it was served on  
22 November 19, 2021, reasoning that this deadline for “supplemental reports” applies only to  
23 supplemental reports evaluating new evidence related to RMC. The Scheduling Order, however,  
24 includes no such subject matter limitation for “supplemental reports.” If Plaintiffs had any doubt  
25 about the scope of the Scheduling Order, they should have sought clarification soon after the  
26 Order issued, and certainly before the parties expended time and expense taking Wilcox’s

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1 deposition.

2 Nevertheless, the Court agrees with Plaintiffs that the Wilcox Report is not truly a  
3 supplemental report. Federal Rule of Civil Procedure 26(e)(1) provides in pertinent part that a  
4 party that has made its expert disclosures “must supplement or correct its disclosure or response in  
5 a timely manner if the party learns that in some material respect the disclosure or response is  
6 incomplete or incorrect, and if the additional or corrective information has not otherwise been  
7 made known to the other parties during the discovery process or in writing.” Fed. R. Civ. P.  
8 26(e)(1). “The purpose of the rule is to prevent surprise or ambush at trial.” *Medtronic Vascular,*  
9 *Inc. v. Abbott Cardiovascular Systems, Inc.*, 2008 WL 4601038, at \*1 (N.D. Cal. Oct. 15, 2008).  
10 “Case law interpreting the rule reflects that a supplemental disclosure must be exactly that—i.e., a  
11 supplement,” and “[a] party may not rely on Rule 26(e)(1) as a way to remedy a deficient expert  
12 report or as a means of getting in, in effect, a brand new report.” *Id.*; see also *Chinitz v. Intero*  
13 *Real Estate Servs.*, 2020 WL 7391299, at \*3 (N.D. Cal. July 22, 2020) (“supplementation under  
14 the Rules means correcting inaccuracies, or filling the interstices of an incomplete report based on  
15 information that was not available at the time of the initial disclosure.”) (quoting *Luke v. Family*  
16 *Care & Urgent Med. Clinics*, 323 F. App’x 496, 500 (9th Cir. 2009)).

17 Here, Google does not contend that the Wilcox Report corrects information in the Kivetz  
18 Report. Nor does Google suggest that the Kivetz Report was incomplete. Instead, Google argues  
19 that Wilcox’s Report is intended to address legal and factual developments that occurred after the  
20 close of discovery in 2018. The purported new legal development is *IntegrityMessageBoards.com*  
21 *v. Facebook, Inc.*, 2021 WL 3771785 (Aug. 24, 2021 N.D. Cal.) (“*IMB*”), where the court cited  
22 the results of an advertiser survey in denying certification to a putative class of advertisers. *IMB*,  
23 however, did not change the state of the law on UCL or class certification. Therefore, *IMB* does  
24 not justify the timing of the Wilcox Report.

25 Google asserts that the purported new factual developments consist of the depositions of  
26 Cabrera (individually and as representative of RMC), Martin Peen (who bought Training Options

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(TO) from Cabrera), and Cabrera's current business partner David Denning. The Wilcox Report, however, does not discuss any of these depositions. Indeed, Wilcox testified that he did not even review Cabrera's deposition testimony, and there is no indication in the record that he ever read Peen's or Denning's deposition testimony either.

The inescapable conclusion is that the Wilcox Report and the survey are clearly intended to strengthen the Kivetz Report, which is not a proper basis for supplementing expert reports under Rule 26(e). *See Rovid v. Graco Children's Product Inc.*, 2018 WL 5906075, at \*11 (N.D. Cal. Nov. 9, 2018) (a report that attempts to strengthen or deepen opinions should be excluded or stricken under Rule 37(c)); *see also Green v. City and Cty. of San Francisco*, 2015 WL 1738025, at \*4 (N.D. Cal. Apr. 8, 2015) (same); *Cave Consulting Grp., Inc. v. OptumInsight, Inc.*, 2018 WL 1938555, at \*3 (N.D. Cal. Apr. 25, 2018) ("The Court cannot accept a definition of supplementation which would essentially allow for unlimited bolstering of expert opinions.") (citing *Akeva L.L.C. v. Mizuno Corp.*, 212 F.R.D. 306, 310 (M.D.N.C. 2002)). Unlike in *Finjan, Inc. v. Cisco Sys., Inc.*, 2019 WL 6174936, at \*7 (N.D. Cal. Nov. 12, 2019), the Wilcox Report cannot be seen as a supplementation that merely "clarifies or amplifies matters expressly referenced in [an] original report" because the Wilcox Report does not address evidence relied on in the Kivetz Report.

The timing of the Wilcox Report is not substantially justified. There is no reason that Wilcox could not have conducted the survey and prepared a report in 2018. Finally, the timing of the Wilcox Report is not harmless. Although Plaintiffs deposed Wilcox and had time to designate a rebuttal expert, allowing Google to rely on the Wilcox Report at this very late stage in the proceedings would be disruptive to Plaintiffs' preparation of their case as well as to the Court. *Wong v. Regents of Univ. of California*, 410 F.3d 1052, 1062 (9th Cir. 2005) ("[d]isruption to the schedule of the court and other parties ... is not harmless."). The parties have been litigating this case for over a decade. Both sides have had a full and fair opportunity to develop the record, and have ample expert opinions upon which to rely. There is no reasonable justification to expand the

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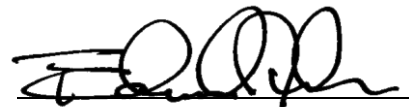
record with a survey and an expert report that could have and should have been prepared years ago.

**III. CONCLUSION**

For the reasons stated above, Plaintiffs' motion is GRANTED.

**IT IS SO ORDERED.**

Dated: September 19, 2022



EDWARD J. DAVILA  
United States District Judge

United States District Court  
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